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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-957

CHARLES J. PANARELLA,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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December 19, 1979

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IN THE

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No. _____

CHARLES J. PANARELLA,

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THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

The petitioner Charles J. Panarella respectfully prays that a writ of certiorari issue to review the judgment of the New York State Court of Appeals affirming the judgment of conviction entered against petitioner by the County Court of Ulster County, New York.

Opinions Below

The opinion and order of the New York Court of Appeals, not yet reported, appears in the appendix hereto at page 1a. The opinion of the intermediate appellate court, the New York State Supreme Court, Appellate Division, Third Judicial Department, appears in the appendix at page 2a and is reported in *People v. Panarella,* 66 A.D.2d 968, 412 N.Y.S. 2d 200 (3rd Dept. 1978). An earlier Appellate Division opinion, relevant to both the appeal to the New York Court of Appeals and this petition, appears in the appendix at page 10a and is reported in

People v. Panarella, 50 A.D.2d 304, 377 N.Y.S.2d 709 (3rd Dept. 1975). The trial court's opinion on the speedy trial issue, unreported, appears in the appendix at p. 16a. The trial court's opinion on the search issue, also unreported, appears at p. 21a.

Jurisdiction

The date of the judgment of the New York State Court of Appeals was November 15, 1979, which was also the date of entry. This Court's jurisdiction is invoked under Title 28 United States Code § 1257 (3).

Questions Presented

1. Whether defense counsel in a criminal case may, under the "standard waiver" doctrine, waive his client's constitutional right to a speedy trial without any record of knowledge or authorization by the defendant?

2. Whether the constitutional right to a speedy trial may be *impliedly* waived under the "standard waiver" doctrine?

3. Does the Fourth Amendment prohibit the seizure of an automobile traveling behind another automobile driven by the subject of an arrest warrant where the arresting officers knew only that both automobiles were traveling together?

4. Did the New York courts create an unwarranted expansion of the rule established in *Terry v. Ohio*, 392 U.S. 1, 87 S.Ct. 2050 (1968)?

Constitutional Provisions Involved in the Case

1. United States Constitution, Amendment VI; In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...

2. United States Constitution, Amendment IV; The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.

Statement of the Case

I

On January 25, 1978, Charles J. Panarella was found guilty of having unlawfully possessed two handguns nearly six years earlier on April 24, 1972. *New York Penal Law Section 265.05 (McKinney's 1967).* On May 22, 1974, more than two years after his arrest, Panarella moved to dismiss this indictment, returned on February 27, 1974, upon the ground that his constitutional right to a speedy trial had been violated. On November 22, 1974, the trial court found a speedy trial violation and dismissed the indictment. Upon the State's appeal, a divided panel of the Appellate Division, Third Judicial Department, reversed the County Court order and reinstated the indictment. The majority, over the dissent of two justices, found that although there had been a prima facie speedy trial violation, it had been waived by action, or perhaps inaction, of defense counsel.*

The Appellate Division acknowledged, as the trial court found, that "...the District Attorney testified that the defendants did not enter into any express agreement through their counsel of waiver of the right to a speedy trial." 377 N.Y.S.2d at 710. Nevertheless, the Court relied upon the fact that according to testimony elicited at a

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*The Court found that the delay was "inordinate upon its face"; that the People's "justification" was insufficient; that there were no circumstances beyond the control of the District Attorney; and that prejudice had been alleged. *People v. Panarella*, 377 N.Y.S.2d at 710.

hearing, defense counsel "by express acquiescence and urgings" participated in the pre-indictment delay. Since, as the Appellate Division held, "there need be no express or explicit waiver of the right to a speedy trial", the Court pinned its decision upon counsel's alleged abandonment of a fundamental constitutional right.

Since the Appellate Division's decision reinstating the indictment was made upon both "law and fact" New York statute prohibited a further appeal from that court's order. *Criminal Procedure Law Section 450.90 (2) (a).* Yet it was not until more than three years later that this case was brought to trial. On post-conviction direct appeal to both the Appellate Division and the New York Court of Appeals the "speedy trial - waiver" argument was made. In affirming the conviction, neither court addressed this issue.

II

Also prior to trial Panarella moved to suppress the two handguns which he was alleged to have unlawfully possessed upon the ground that seizure of these weapons violated his Fourth Amendment rights. This motion was denied by the trial court. Although this Fourth Amendment issue was both briefed and argued to the Appellate Division and the Court of Appeals, neither Court spoke to the issue in their respective opinions.

The facts relevant to the search question are not complicated. Testimony given at a suppression hearing established that Federal Agents accompanied by local police officers were keeping watch on an Upstate New York farm house owned by Alphonse Persico, the subject of a federal arrest warrant.* Although observing Persico on Sunday,

*Notably, the warrant related to a non-violent crime, the submission of an alleged fraudulent bank loan application. Title 18 United States Code § 1014.

April 23, 1972, the agents decided to wait until he left his property before arresting him "preferably when he was in a car." Panarella became a subject of the agents' interest when, also on April 23rd, he arrived at the Persico farm house with two companions, a woman and a man. The Sunday surveillance continued until sometime after midnight when it appeared that all the occupants had gone to sleep.

It was not until the following day, Monday, April 24th, that Persico entered a vehicle and drove away from the farm. At the same time Panarella and the two people with whom he came, entered their vehicle and followed Persico onto the highway. The testimony established that the agents knew precisely which vehicle Persico was driving. Also relevant is the fact that the agents never saw Panarella or his two companions in possession of any weapons on either April 23rd or April 24th. Moreover, Panarella's vehicle had committed no traffic violation. Nevertheless, the agents (testimony showed that there were at least six or seven F.B.I. agents in addition to five or six New York State police officers utilizing some "six or seven" police vehicles) decided to stop *both* automobiles because as one agent would later put it they had an "inclination" that there was a weapon in the Panarella car. Once the car driven by Panarella was in the process of being stopped, the agents saw a motion made by Panarella with his arm toward the rear of the car. Significantly, this motion was made after the agents had interfered with the car's progress. Once the car was ordered to the side of the road, the agents approached with guns drawn. Upon ordering the occupants out of the car the agents saw two handguns on the rear floor directly in front of a rear seat passenger.

Reasons for Granting The Writ

There are three compelling reasons for granting the writ in this case.

1. The New York courts have apparently retained a rigid "demand-waiver" rule which was expressly rejected by this Court more than seven years ago in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972).

2. By this case the New York courts have ruled that an attorney may waive fundamental constitutional rights guaranteed to his client without any evidence whatsoever that the client himself had made a "knowing and intelligent" waiver.

3. The New York courts ruling on this seemingly novel search and seizure issue contradicts principles of Fourth Amendment law established by this court.

Each of these issues, it is submitted, have far-reaching implications and thus require an authoritative response by this court.

I

THE NEW YORK COURT COMPLETELY FAILED TO BALANCE THE CONDUCT OF BOTH THE PROSECUTION AND DEFENSE IN DECIDING WHETHER THE TRIAL COURT HAD PROPERLY DISMISSED THE INDICTMENT UPON THE GROUND OF A SPEEDY TRIAL VIOLATION.

In this case the New York Appellate Division, whose action was ultimately affirmed by the Court of Appeals, did precisely that which this Court condemned in *Barker v. Wingo, supra.* There was here clearly no balancing test "in which the conduct of both the prosecution and the defendant [was] weighed." Here it was found that the delay was inordinate; the reason for it inadequate; and that there was prejudice to defendant. In the Appellate

Division's decision however these factors were simply set aside because of the paramount finding of waiver. This Court, in *Barker*, held that waiver is not of paramount consideration and is only one of four relevant factors to be weighed.

In *Barker*, this Court specifically recognized, for example, that a situation where an "attorney acquiesces in long delay without adequately informing his client" is to be given "different weight" from one in which the defendant knowingly fails to object. 407 U.S. at 530. To say, as the New York Court held, that an attorney's acquiescence alone could by itself deny relief from a speedy trial violation contradicts both the letter and spirit of *Barker*. While defense counsel's "acquiescence" may have been a factor to consider, it was not, as here, to be considered as singularly determinative.

II

THE NEW YORK COURT IMPROPERLY HELD THAT AN ATTORNEY MAY WAIVE HIS CLIENT'S FUNDAMENTAL CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

The New York Courts have held in this case that the right to a speedy trial may be impliedly waived and that there need be no express or explicit waiver of that important right. Petitioner respectfully submits that under the facts of this case a rather dangerous precedent has been established.

In a speedy trial context "waiver" can really be given two meanings. For purposes of the *Barker* balancing criteria "waiver" may generally refer to the conduct of the defendant or for that matter his counsel. In *Barker*, this Court acknowledged that in allowing consideration of defendant's conduct, the "standard waiver" rule, *i.e.*, that waiver must be knowingly and voluntarily made, is

relaxed somewhat so that any omissive or comissive act by a defendant may be evaluated. It is in this context that this Court obviously expected that different weight would be attached to different situations presented on a case-by-case basis. Petitioner's first argument is that the New York courts have erred in considering something less than defendant's knowing and voluntary waiver as an *absolute bar* to relief instead of one of four factors to be considered.

But, waiver, even in a speedy trial context, can have yet another meaning. What this Court in *Barker* described as the "standard waiver" doctrine may apply. Under "standard waiver" the court looks for an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938); *Brewer v. Williams*, 430 U.S. 406, 97 S.Ct. 1232 (1977). Standard Waiver may occur, as this Court noted in *Barker*, where the delay is attributable to the defendant. It may also occur, obviously, where a defendant knowingly and voluntarily surrenders his right to a speedy trial. What the New York courts have seemingly done in this case has been to utterly confuse the two types of waiver. Certiorari is important in this case because this confusion should not be permitted to stand.

Simply stated the confusion in this case apparently stems from the fact that the Appellate Division borrowed the "standard waiver" doctrine and applied it to the issue of demand under the *Barker* balancing test.* If there is a true "standard waiver" then the other *Barker* factors

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*Although the Appellate Division makes no reference to this Court's decision in *Barker v. Wingo*, instead citing the balancing test contained in the New York Court of Appeals decision in *People v. Taranovich*, 37 N.Y.2d 442, 373 N.Y.2d 79 (1975), it is clear that *Taranovich* was guided by *Barker* and that both cases are cast in federal constitutional terms.

become irrelevant. No matter how long the delay, no matter how shallow the reason for delay, no matter what prejudice evolves, the speedy trial right, like any other constitutional privilege, may indeed be waived. But, and this qualification is critical, waiver of this sort may not be accomplished by an attorney's "acquiescence." Waiver of this sort cannot be regarded as a strategic and tactical decision. See, *Estelle v. Williams*, 425 U.S. 510, 96 S.Ct. 1691, 1695 n. 3 (1976). Surely, strategic and tactical decisions may be properly considered when utilizing the *Barker* test. They may not however amount to "standard waiver" of a fundamental constitutional right. Both the majority and dissenting opinions of the Appellate Division make clear the fact that petitioner in this case did nothing which could even be remotely construed as a "standard waiver." By relaxing the waiver doctrine in the speedy trial context in order to allow a court to weigh a defendant's conduct, this Court did not suggest that the "standard waiver" criteria, found in *Johnson v. Zerbst*, be relaxed as well.

III

THE NOVEL SEARCH AND SEIZURE ISSUE PRESENTED IN THIS CASE WAS IMPROPERLY RESOLVED BY THE NEW YORK STATE COURTS.

In light of the recent cases decided by this Court on the issue of investigative stops of automobiles and the permissible scope of a proper search, *Delaware v. Prouse*, ____ U.S. ____, 99 S.Ct. 1391 (1979); *Ybarra v. Illinois*, ____ U.S. ____ (Nov. 28, 1979), 26 Cr.L. 3017, this point need not be belabored. The applicable principles of law are not in dispute. No one, throughout this litigation, has suggested that the law enforcement officers had probable cause to seize Panarella's vehicle. This Court has held nevertheless that an automobile may be subject to an investigative stop upon less than probable cause. *United States v. Brignoni - Ponce*, 422 U.S. 873, 95 S.Ct.

2574 (1975). However, to make such a stop there must be reasonable suspicion that either the automobile or its occupants are subject to seizure under applicable criminal laws. *Terry v. Ohio*, 392 U.S. 1; 87 S.Ct. 2050 (1968); *Delaware v. Prouse, supra.* If such reasonable suspicion is absent, the stopping of the automobile by the police constitutes an impermissible seizure. *Delaware v. Prouse, supra.*

Very recently, in *Ybarra v. Illinois, supra* this Court, in limiting the scope of an authorized search, held that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." (Citing *Sibron v. New York*, 392 U.S. 40, 62-63, 88 S.Ct. 1889 (1968)). In the instant case the New York court has created an unwarranted expansion of the *Terry* doctrine by allowing the seizure of an automobile containing persons against whom there was not any reasonable suspicion of criminal activity. This case may well be interpreted to presently stand for the proposition that persons in the company of one who is subject to a lawful arrest, even though as here in a separate automobile, automatically surrender their own right to privacy. Such a result, it is submitted, is simply intolerable.

Conclusion

For these reasons a writ of certiorari should issue to review the judgment and opinion of the New York State Court of Appeals.

Respectfully submitted,

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December 19, 1979

APPENDICES

Appendix A - Opinion and Order of the New York Court of Appeals

COURT OF APPEALS
STATE OF NEW YORK

No. 439

THE PEOPLE & C.,

Respondent,

vs.

CHARLES J. PANARELLA,

Appellant.

Order affirmed for the reasons stated in the memorandum at the Appellate Division (66 A.D.2d 968) except insofar as it suggests that there was direct evidence in the record to support the conviction.

All concur.

Appendix B - Opinion of Appellate Division: Third Judicial Department

66 A.D.2d 968

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

v.

CHARLES J. PANARELLA,
Appellant.

Supreme Court, Appellate Division,
Third Department.

Dec, 28, 1978.

Defendant was convicted in the County Court, Ulster County, Battisti, J., of two counts of criminal possession of a dangerous weapon, and he appealed. The Supreme Court, Appellate Division, held that: (1) testimony of FBI agents provided reasonable basis upon which jury could reliably infer that defendant threw at least one of handguns into rear seat of car, and (2) there was sufficient evidence in record to support hypothetical question to People's expert witness concerning improbability that fingerprints would be found on weapons.

Affirmed.

Mahoney, P. J., dissented and filed opinion.

Fischetti & Shargel, New York City (Gerald L. Shargel, New York City, of counsel), for appellant.

E. Michael Kavanagh, Ulster County Dist. Atty., Kingston, for respondent.

Before MAHONEY, P. J., and GREENBLOTT, KANE, MAIN and MIKOLL, JJ.

MEMORANDUM DECISION.

Appeal from a judgment of the County Court of Ulster County, rendered April 26, 1978, upon a verdict

convicting defendant of two counts of the crime of criminal possession of a dangerous weapon.

On April 23, 1972, FBI agents, aided by the New York State Police, established surveillance over the farmhouse of Alphonse Persico located in Saugerties, Ulster County. The agents had a Federal arrest warrant for Persico. On the morning of April 24, when Persico drove away from his family quarters, he was followed by a Buick automobile operated by defendant with one Antoinette Periotti (a/k/a April Ballinger) as a front seat passenger and one John Pate seated in the rear. An automobile operated by FBI agents Tallia and McWeeney then approached and came up behind the Panarella vehicle, and as the FBI vehicle moved left and then pulled along side of it, the defendant was ordered by agent McWeeney to pull over and stop. At the trial, agent McWeeney testified that as the Panarella vehicle was edging over towards the righthand side of the road, he observed that "[defendant] had his left hand on the wheel and then he put his right hand behind the front seat and, in a throwing motion, threw something to the rear of the car". He further recalled that the woman seated in the right front seat made no motion and that he did not see her throw anything under the seat. Agent Tallia also testified that as he maneuvered his car along side of the Panarella vehicle, he too "noticed the driver [defendant] reach over with his right hand over the back seat." After the occupants were removed from the Panarella vehicle, it is undisputed that the only things which were discovered on the rear seat floor were two fully loaded handguns.

Both defendant and Pate were arrested, arraigned and subsequently jointly indicted for criminal possession of the loaded handguns, class D felonies. After this court reversed an order dismissing the indictments upon the ground that they had been denied a speedy trial (*People v. Panarella*, 50 A.D.2d 304, 377 N.Y.S.2d 709), the joint

indictment was severed and defendant proceeded to trial alone.

The People disclaimed reliance upon the presumption of possession by occupants of an automobile of a firearm found therein but not in the physical possession of any one occupant (Penal Law, § 265.15 [3]).* At the trial defendant presented the testimony of John Pate, who characterized defendant's arm and hand motion as follows: "April Ballinger was panicked; Charlie [defendant] reached over probably to prevent her from going out the door." April Ballinger was deceased at the time of trial, and the defendant did not testify. Based on Pate's testimony, the defendant contends that the prosecution's evidence was insufficient to exclude to a moral certainty every reasonable hypothesis of innocence.

In our view, this case comes under the rule enunciated by the Court of Appeals in *People v. Sabella*, 35 N.Y.2d 158, 359 N.Y.S.2d 100, 316 N.E.2d 569 where Judge Wachtler stated (*id.* at 168, 359 N.Y.S.2d at 109, 316 N.E.2d at 575):

> [A]ccording to the weight of authority, where the circumstantial evidence serves only to corroborate the direct testimony of a single witness, it need not exclude to a moral certainty every hypothesis but guilt (see Ann., Corroboration by circumstantial evidence of testimony of single witness in prosecution for perjury, 111 A.L.R. 825). Since that standard only governs cases "where the prosecution relies wholly upon circumstantial evidence to establish the guilt of the accused" (Richardson, Evidence [10th ed.], § 418, p. 119) it has no bearing where the circumstantial evidence merely furnishes partial proof of a single element * * *.

*The United States Court of Appeals (2d Cir.) has recently declared the statutory presumption of section 265.15 (subd. [3]) unconstitutional (*Allen v. County Court, Ulster County*, 568 F.2d 998. But see *People v. Lemmons*, 40 N.Y.2d 505, 387 N.Y.S.2d 97, 354 N.E.2d 836).

In the case at bar, the conviction was based partially on direct evidence and partially on circumstantial evidence. Agent McWeeney testified that the defendant threw something into the rear seat of the automobile. This was direct testimony. Since the only objects found in the rear seat by the police were the two handguns, the jury could properly infer that the object thrown by the defendant was a gun.

[1-3] Assuming *arguendo* that the conviction rests solely upon circumstantial evidence, the evidence presented by the prosecution was nonetheless sufficient to uphold the conviction. Since the defendant challenges the sufficiency of the circumstantial evidence, the facts and the evidence, as a whole, must be viewed most favorably to the People (*People v. Benzinger*, 36 N.Y.2d 29, 32, 364 N.Y.S.2d 855, 856, 324 N.E.2d 334, 335; *People v. Cleague*, 22 N.Y.2d 363, 366, 292 N.Y.S.2d 861, 863, 239 N.E.2d 617, 618). It is well-settled that where a conviction rests solely upon circumstantial evidence, the facts from which the inference of guilt is drawn must be inconsistent with innocence and must exclude to a moral certainty every other reasonable hypothesis (e.g., *People v. Bearden*, 290 N.Y. 478, 480, 49 N.E.2d 785, 786; *People v. Cleague, supra*, 22 N.Y.2d pp. 365-66, 292 N.Y.S.2d pp. 862-863, 239 N.E.2d pp. 617-18). However, the Court of Appeals has always accepted circumstantial evidence as a sound basis for adjudication in criminal cases (*People v. Wachowicz*, 22 N.Y.2d 369, 292 N.Y.S.2d 867, 239 N.E.2d 620). The test "should not be a substitute for reasoned thought" (*People v. Borrero*, 26 N.Y.2d 430,

435, 311 N.Y.S.2d 475, 479, 259 N.E.2d 902, 905), and "[i]n the end, it is a question whether common human experience would lead a reasonable man, putting his mind to it, to reject or accept the inferences asserted for the established facts" (*People v. Wachowicz, supra*, 22 N.Y.2d pp. 369, 372, 292 N.Y.S.2d pp. 867, 869, 239 N.E.2d 620, 622). In our view, the testimony of the FBI agents provided a reasonable basis upon which the jury could reliably infer that the defendant threw at least one of the handguns into the rear seat of the car (*People v. Davis*, 41 N.Y.2d 678, 679, 394 N.Y.S.2d 865, 866, 363 N.E.2d 572; *People v. Ryan*, 41 N.Y.2d 634, 640, 394 N.Y.S.2d 609, 612, 363 N.E.2d 334, 337). The jury could reject Pate's testimony, and considering the totality of the People's evidence, properly find that defendant's guilt was established beyond a reasonable doubt (see *People v. Williams*, 43 N.Y.2d 725, 726-27, 401 N.Y.S.2d 487, 372 N.E.2d 328) for, under the facts herein, "common human experience would lead a reasonable man putting his mind to it, to * * * accept the inference asserted for the established facts" (*People v. Wachowicz, supra*, 22 N.Y.2d p. 372, 292 N.Y.S.2d p. 869, 239 N.E.2d p. 622).

[4, 5] One further point deserves consideration. During cross-examination of agent McWeeney, the defense counsel attempted to elicit that defendant's fingerprints were not found on either of the weapons. In response, the People on their direct case called an expert witness who testified that it was improbable that fingerprints would be found on the weapons. In posing a hypothetical question to this expert witness, the prosecutor had the expert assume that the driver of the vehicle removed a handgun from the waistband of his trousers and then passed it to the rear seat passenger. We reject defendant's contention that there was no evidence in the record to support this hypothesis. A hypothetical question may

include facts which are not established beyond all controversy, and each side may formulate the question according to its theory of the case (Richardson, Evidence [10th ed.], § 370, p. 347). It was perfectly clear that the People's theory was that defendant had removed one of the handguns from his person and then threw it into the rear seat of the car. Furthermore, the question was shaped in direct response to and in the context of defendant's attempt to establish that his fingerprints were not found on the weapons. In our view, therefore, the basis of the question was sufficiently supported by the evidence which theretofore had been adduced.

We have examined defendant's other contentions and find them to be without merit.

Judgment affirmed.

GREENBLOTT, KANE and MAIN, JJ., concur.

MAHONEY, P. J., and MIKOLL, J., dissent and vote to reverse in the following memorandum by MAHONEY, P. J.

MAHONEY, Presiding Justice (dissenting).

We cannot agree with the statement of the majority that the judgment of conviction of criminal possession of a dangerous weapon (Penal Law, § 265.05) " * * * was based partially on direct evidence and partially on circumstantial evidence." In our view, the evidence is wholly circumstantial. Defendant Panarella was accused in each count of the indictment of having "in [his] possession a *firearm loaded with ammunition* * * *" (emphasis added). He was not accused of having "something" in his possession. The testimony of agent McWeeney was merely proof of an event or happening which afforded a basis for a reasonable inference by the jury of the occurrence of the fact charged, i.e., that the "something" was a "fire-

arm", as charged in the indictment. This is a classic example of proof by circumstantial evidence. Therefore, in the absence of the statutory presumption (Penal Law, § 265.15, subd. [3]) guilt can only be established by circumstantial evidence that excludes to a moral certainty every reasonable hypothesis of innocence (*People v. Cleague*, 22 N.Y.2d 363, 292 N.Y.S.2d 861, 239 N.E.2d 617). Where, as here, the crime charged in the indictment consists of only a single element, the circumstantial evidence must be of such probative quality that it precludes everything but guilt. In *People v. Sabella*, 35 N.Y.2d 158, 168, 359 N.Y.S.2d 100, 108, 316 N.E.2d 569, 575, cited by the majority, the court was concerned with the statutory requirement of corroborative proof in the prosecution of a perjury indictment. In concluding that such a requirement can be satisfied where circumstantial evidence furnishes partial proof of a single element of the crime charged, the court took great pains to point out that it was not undermining the standard of excluding every hypothesis but guilt to a moral certainty in those cases, as here, "[w]here the prosecution relies *wholly* upon circumstantial evidence to establish the *guilt* of the accused." (*Id.* at 168, 359 N.Y.S.2d at 109, 316 N.Y.S.2d at 575; citations omitted.) (Emphasis added.) In *Sabella, supra*, the circumstantial evidence was tested as to its probative worth to *corroborate* a single element of a crime. Here, like proof must prove *guilt*. Given the standard to be applied, it cannot.

Of course, the above discussion of the quality of the circumstantial evidence is anchored to the testimony of Pate who characterized defendant's arm and hand motion as follows: "April Ballinger was panicked; Charlie [defendant] reached over probably to prevent her from going out the door." While this testimony of John Pate, under indictment on the same charges as defendant, is suspect and

offers an explanation of defendant's conduct that may be unlikely, it is, nevertheless, rational and consistent with innocence. It cannot be removed from the fact pattern against which the "hypothesis" standard must be weighed by stating that "[T]he jury could reject Pate's testimony * * *" and "properly find that defendant's guilt was established beyond a reasonable doubt" (citation omitted). (Majority opinion, p. 202.) Such tailoring would result in a digest of the totality of the evidence and be a wholly inadequate backdrop against which to weigh and test the "hypothesis" standard. The test should not be what the jury found, but rather, what it could have concluded given testimony consistent with the innocence of the accused. We are not dealing with the *reality* of the jury's verdict. Rather, our concern must be with the *hypothesis* raised by the totality of the proof before the case is presented to the veniremen. Here, the testimony of John Pate, who could have exonerated himself by testifying that defendant physically possessed one of the handguns, must be accorded a degree of rationality consistent with an hypothesis of innocence on the part of the defendant (*People v. Cleague, supra*).

The judgment should be reversed, and the indictment dismissed.

Appendix C - Opinion of Appellate Division: Third Judicial Department (Reinstating Indictment)

50 A.D.2d 304

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

v.

CHARLES PANARELLA et al.,
Respondents.

Supreme Court, Appellate Division, Third Department.

Dec. 30, 1975.

Defendants charged with criminal possession of loaded handguns, class D felonies, moved to dismiss indictment on ground that they had been denied their right to speedy trial as evidence by the more than two-year delay between date of their arrest and date of motion for dismissal without a trial. The County Court of Ulster County, Raymond J. Mino, J., granted defendants' motion to dismiss indictment and appeal was taken. The Supreme Court, Appellate Division, Herlihy, J., held that the record showing the continual acquiescence of defense counsel in delay because of pending concurrent federal charges established waiver of right to speedy trial as a matter of law.

Order reversed, motion denied and indictment reinstated.

Greenblott, J., filed a dissenting opinion in which Main, J., concurred.

Francis J. Vogt, Dist. Atty. (Edward M. P. Greene, Kingston, of counsel), for appellant.

William D. Pretsch, Kingston, for respondents.

Before HERLIHY, P. J., and GREENBLOTT, MAIN, LARKIN and REYNOLDS, JJ.

Appendix C - Opinion of Appellate Division: Third Judicial Department (Reinstating Indictment)

OPINION FOR REVERSAL

HERLIHY, Presiding Justice.

Defendants and a third party were arrested on April 24, 1972 and arraigned on a felony complaint charging them with criminal possession of loaded handguns, class D felonies. The three arrestees were released on minimal bail. On May 22, 1974, defendants moved to dismiss the indictment on the ground that they had been denied their right to a speedy trial. The motion was granted and the present appeal ensued.

In the interim, a motion to suppress evidence had been made in Supreme Court of Ulster County on May 24, 1972 upon which no action had been taken at the time of the motion or the decision leading to the order herein. Until May 14, 1973, charges were pending against the defendant Panarella in the United States District Court for the Southern District of New York, and the Ulster County District Attorney's Office had agreed to "not push the case" so as not to provide Panarella with the defense of double jeopardy. The case was finally presented to the Ulster County Grand Jury in January, 1974 which returned an indictment on February 27, 1974.

Applying the factors set forth in the recent case of *People v. Taranovich*, 37 N.Y.2d 442, 373 N.Y.S.2d 79, 335 N.E.2d 303, it should be noted that the delay in this case is inordinate upon its face and the People's justification insofar as there is reliance upon the concurrent Federal charges and the pending suppression hearing would not be of great weight. Furthermore, the defendants have alleged some prejudice from the death of an original codefendant.

The District Attorney's testimony clearly establishes that the delay in this case had nothing to do with circumstances beyond the control of the District Attorney.

In considering the reason for the delay and also the question of prejudice to the defendants because the co-defendant Perrotti died prior to the indictment and would be unavailable as an eyewitness, the District Attorney's testimony included more than simple allegations of factors causing delay beyond his control. As noted by the trial court, the District Attorney testified that the defendants did not enter into any express agreement through their counsel of waiver of the right to a speedy trial. Nevertheless, the District Attorney did testify that he discussed the status of the case on many occasions with counsel for the defendants and that such counsel agreed that it would be in the best interests of everyone to hold the matter in abeyance pending the Federal Court proceedings; that defense counsel was not anxious to move the case; that defense counsel was consenting to the case remaining in abeyance; that defense counsel specifically asked the District Attorney not to indict pending the suppression hearing and/or the Federal proceedings; that even after the indictment was returned, the defense counsel wanted a delay in arraignment pending a suppression hearing; and, of course, the actual motion to dismiss for delay was not made until June 12, 1974.

To affirm this case would establish a pattern whereby the defense may actively participate in the pre-indictment delay by express acquiescence and urgings and thereby secure the dismissal of an indictment. We note that this pattern of conduct is in sharp contrast to that of the defendant in *People v. Johnson*, 38 N.Y.2d 271, 379 N.Y.S.2d 735, 342 N.E.2d 525 [Dec. 4, 1975]) who made a continuing effort to have the charges against him finally resolved.

[1, 2] There need be no express or explicit waiver of the right to a speedy trial (*People v. Timothy*, 34 N.Y.2d 867, 868, 359 N.Y.S.2d 114, 115, 316 N.E.2d 580). This

record establishes such a waiver as a matter of law and any prejudice to the defendants is self-imposed. The facts disclosed at the hearing held by the trial court upon this motion establish that the motion has no merit. The dismissal of the indictment was erroneous.

The order should be reversed, on the law and the facts, the motion denied and the indictment reinstated.

Order reversed, on the law and the facts, motion denied and indictment reinstated.

LARKIN and REYNOLDS, JJ., concur.

GREENBLOTT and MAIN, JJ., dissent and vote to affirm in an opinion by GREENBLOTT, J.

GREENBLOTT, Justice (dissenting).

In *People v. Taranovich*, 37 N.Y.2d 442, 373 N.Y.S.2d 79, 335 N.E.2d 303, the Court of Appeals enumerated various factors to be considered in deciding the propriety of dismissing indictments for failure to afford a speedy trial.*

Two such factors are the extent of the delay, which in this case amounts to 22 months, and the reason therefor. We regard such a delay in the absence of any showing of justification, as presumptively excessive. While the People urge that much of this delay was attributable to the District Attorney's deferring to Federal authorities, it appears that the prosecution still failed to proceed for nine months after Federal charges were dismissed. As between the defendant and the People, the latter must bear full responsibility for the period of delay subsequent to the dismissal of the Federal charges.

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*Section 30.30 (subd. 1, par. [a]) of the Criminal Procedure Law as effective May 1, 1972—one week after the arraignment of the defendants herein—establishes a period of six months for trial of a criminal action. *Taranovich* dealt with an action commenced prior to the applicability of this statute, wherefore its guidelines are applicable in the present case.

Another factor enumerated in *Taranovich* is the nature of the underlying charge, which in this case constitutes a class D felony which would not seem the type to carry with it any unusual problems for the prosecution in preparation and proof of the case.

A very significant factor is prejudice to the defendant by potential impairment of its defense, which seems to be present here. The third-party arrestee died on October 4, 1973. While she conceivably would have been a codefendant, her attorney offered testimony at the hearing which the trial court found sufficient to justify a conclusion that the deceased may well have been able to testify to matters which would have exonerated these defendants.

The majority base their decision to reverse the order dismissing the indictment on the testimony of the District Attorney. They concede, as they must, that the District Attorney stated flatly that there was never any express agreement on the part of defense counsel that his clients would waive their right to be tried. Later he again reiterated this when he testified "[h]e (the defense counsel) said, however, that he could not waive on behalf of his clients any delay which had occurred from the time of the arrest to the time of the indictment." (A period of 22 months.)

In view of this strong concession on the part of the District Attorney, his attempts to show an implied waiver were properly rejected by the trial court. Moreover, the District Attorney specifically testified that the main reason for his delay in proceeding was a specific agreement with Federal Authorities as well as his reservations about the merits of his case. We agree with the trial court's statement that the District Attorney has the obligation to diligently and expeditiously move the case for disposition. The case of *People v. Timothy*, 34 N.Y.2d 867, 359 N.Y.S.2d 114, 316 N.E.2d 580, relied on by the majority, is inapposite because it was indisputable that the

delays there were attributable to numerous changes in representation by the defendant. Under the circumstances here presented, the trial court had no alternative but to dismiss the indictment.

We accordingly dissent and vote to affirm the order of the trial court.

Appendix D - Unreported Trial Court Opinion
(Dismissing Indictment)

STATE OF NEW YORK
COUNTY COURT : COUNTY OF ULSTER
THE PEOPLE OF THE STATE OF NEW YORK,
- against -
CHARLES PANARELLA and JOHN PATE,
Defendants.

(Ulster County, Special Term, June 12, 1974, Calendar)
FINAL PAPERS SUBMITTED October 29, 1974
(JUDGE RAYMOND J. MINO, PRESIDING)

APPEARANCES:
Hon. Francis J. Vogt, District Attorney
for the People of the State of New York,
(Michael Kavanagh, Esq., of counsel)

WILLIAM PRETSCH, ESQ., Attorney for
Defendants.

RAYMOND J. MINO, JUDGE :

Defendants are charged with the crime of possession of a dangerous instrument and appliances in violation of § 265.05, subd. 2 of the Penal Law of the State of New York, alleged to have been committed on April 24, 1972. A motion was made for an order suppressing certain tangible evidence and dismissing the indictment on the ground that defendants were denied their right to a speedy trial. After reading the motion papers, this Court issued an order for a hearing on the speedy trial issue and directed that the suppression question be held in abeyance.

The hearing concerning defendants' claim to denial of a speedy trial has been completed and we now take up the issues raised by defendants' motion aforesaid. We shall first treat defendants' claim of denial of a speedy trial.

Appendix D - Unreported Trial Court Opinion
(Dismissing Indictment)

On May 24, 1972, a motion to suppress certain evidence allegedly improperly seized was made by defendants addressed to the Supreme Court of Ulster County. In the meantime, the Federal Authorities were preparing criminal charges against defendant, Charles Panarella, and it appears that there were discussions between the District Attorney's office and the United States Attorney's office relative to deferring prosecution of this felony complaint in the New York State criminal court in order to avoid a conflict with the Federal Grand Jury investigation. In fact, the District Attorney testified on the hearing with regard to his conversation with the Assistant U. S. Attorney, "I think I also told them I would not push the case." Also, referring to discussions between himself and defense counsel relative to the delays, the question whether or not defendant's counsel had consented to such delays, the District Attorney said, "We never arrived at any expressed agreement."

Another reason proffered for the delay was the fact that the suppression motion made to Supreme Court returnable June 2, 1972, was never reached. Neither prosecution or defense made any effort to move the hearing and in that regard the District Attorney testified that the Supreme Court did not want to handle the motion and as he recalled it, "The motion bounced from one judge to another and the Supreme Court, not being too familiar with criminal work, just didn't want to handle it."

Fortified with the formula laid down in Barker v. Wingo, 407 U.S. 514, the appellate courts of New York State have apparently adopted a "ready trial rule" as opposed to a "prompt trial rule" (Denzer's Practice Commentary, CPL § 30.30; People v. Ganci, 27 N Y 2d 418; People v. Prosser, 309 N.Y. 353; People v. Rodriguez, 45 A D 2d 41). We must now determine whether or not defendants' constitutional rights have been violated by

examining the length of the delay, the reasons for it, the defendants' assertion of their rights, if any, and the prejudice to them (Barker v. Wingo; People v. Rodriguez, supra).

A delay of twenty-two months is patently inordinate and, without excuse, would be sufficient grounds for dismissal of the indictment (People v. Wallace, 28 N Y 2d 371; People v. Rodridguez, supra). The reasons offered for the delay are several. First of all, the District Attorney points out that the defendants had placed their motion aforesaid on the Supreme Court calendar for suppression of physical evidence and such motion was never heard. The prosecutor claims that he was always ready for the hearing but the case was never called by the court. Apparently, the court's reason for not moving the case was not congestion. Not only is there an absence of proof of congestion but as stated above, the District Attorney himself testified that the Supreme Court, "just didn't want to handle it." At that point the District Attorney also admitted that his office took no steps to bring about a hearing. In using the pendency of this motion as a reason for delay in presenting this case to the Grand Jury, the District Attorney admits that there was no legal impediment to presentment but he felt that since a suppression of the evidence would result in his having no case for trial he felt the prudent thing to do was to await the outcome of the hearing. He also points out that the defendants did nothing to expedite the hearing. Defendants admit this, but they also aver that the District Attorney was purposely delaying presentment for an additional reason; namely, the pendency of Federal charges heretofore referred to.

As for the defendants' assertion of their rights, we begin of course with the proposition that the defendants had no obligation to assert any rights or move for a speedy disposition of this matter. Had they done so their position

here would have been that much stronger, but their failure to do so does not militate against them (People v. Prosser; People v. Rodriguez; Barker v. Wingo, supra). In this instance, defendants apparently did not make any attempt to move their case to indictment and trial. They did acquiesce in the pre-indictment delays but by the District Attorney's own admission, though they did not object, they never did actually consent to the delays. In fact, in later consenting to a delay in arraignment after the indictment the defendants' counsel specifically stated that he was waiving no delays prior to indictment.

Defendants further contend that they have been severely prejudiced by the fact that a witness who would have testified in their favor died in an accident on October 4, 1973, while this allegedly improper delay was being encountered, and nearly 1 1/2 years after defendants' arrest. One of defendants' witnesses on the hearing testified that the decedent informed him of facts which she could attest to which would tend to exculpate defendants.

The only question remaining then is whether or not the District Attorney failed to take affirmative action which he should have taken. We begin with the proposition that the District Attorney has the obligation of diligently and expeditiously affirmatively moving the case for disposition (CPL § 30.20 and 30.30; People v. Prosser; People v. Rodriguez, supra; American Bar Association Project on Standards for Criminal Justice, § 1.2).

This being the case, the question is whether or not the excuses given are sufficient to relieve him of the obligation of presenting this case to the Grand Jury. We think not. We can sympathize with his concern that the work and effort on the part of so many people could, in a sense, be for nought if the defendants were successful in their motion for suppression. We can also understand his preference for defendants' prosecution in the Federal

Appendix D - Unreported Trial Court Opinion
(Dismissing Indictment)

courts. However, these considerations had to be weighed against the extremely heavy weight of defendants' right to a speedy trial. On examining the usual grounds for delay, we find that the excuses here given do not have sufficient gravity to warrant the delay permitted by the District Attorney and the indictment must, therefore, be dismissed (CPL § 30.30; People v. Prosser; People v. Rodriguez, supra). In view of the determination of defendants' speedy trial motion, there is of course, no need for the Court to consider the request for a suppression hearing.

Submit order accordingly.

Dated: November 22, 1974

s/ RAYMOND J. MINO
County Judge of Ulster County

Appendix E - Unreported Trial Court Opinion
(Denying Motion to Suppress)

STATE OF NEW YORK
COUNTY COURT : COUNTY OF ULSTER

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

CHARLES J. PANARELLA and JOHN PATE,
Defendants.

HON. RAYMOND H. MINO, PRESIDING)

APPEARANCES:
Hon. Francis J. Vogt, District Attorney
for the People of the State of New York

William D. Pretsch, Esq., Attorney for
Defendant, Pate

RAYMOND J. MINO, JUDGE :

The defendants, Charles J. Panarella and John Pate, were jointly indicted by an Ulster County Grand Jury for Possession of Two Loaded Handguns in two counts each charging a felony (PL § 265.05, subd. 2). They now move to suppress the weapons contending that they were seized as a result of a warrantless search of a motor vehicle. This Court conducted a hearing and from the evidence adduced at the hearing the Court finds as follows:

On April 23, 1972, agents of the Federal Bureau of Investigation placed a house (the Summer home of Alphonse Persico) located near the Blue Mountain Road in Saugerties, Ulster County, New York, under surveillance in an attempt to locate one Alphonse Persico for whom they had a Federal arrest warrant. As a result of this surveillance, the FBI determined not only that Alphonse Persico was present, but that he and others had access to firearms which they had been seen using on the Persico

premises. It was decided by the FBI agents that for the safety of all concerned, including the women and children who were also in the house, that attempts should not be made to place Persico under arrest until he was away from the residence. The following morning Persico, one Jerry Langella, April Ballanger and the two defendants were seen leaving the house together and entering two separate automobiles. Both vehicles left the premises at the same time, with Persico and Langella occupying the lead car and the two defendants closely following them in the second car. As the two vehicles proceeded down the Blue Mountain Road, the FBI agents moved to take Persico into custody. They put on the red lights and the siren and shortly thereafter both vehicles pulled off to the side of the road. As the defendants' vehicle was coming to a stop, the defendant, Panarella, who was driving, was seen reaching back with his right arm over the seat of the car toward the rear seat where the defendant, Pate, was sitting. When the Panarella car came to a stop, the FBI agents emerged from their vehicle and approached the Panarella car and forcibly removed the defendants from the vehicle. Both defendants were patted down for weapons and none were found. One of the FBI agents then looked into the car and saw two loaded hand guns in the middle of the right portion of the rear floor behind the right-hand passenger seat.

The sole issue in this motion to suppress is whether the FBI agents had the right to stop the defendants' car. If they did, then the "plain view" seizure of the handguns would be legal and the defendants' motion should be denied. However, if the stopping of the defendants' vehicle was an illegal police action, the subsequent seizure as a result of that stop would be fatally tainted and the motion to suppress should be granted.

It is conceded by the Prosecution that at the time the FBI agents stopped the defendants' vehicle probable cause did not exist to believe that any of the occupants of that vehicle had committed a crime. In People v. Ingle (36 N Y 2d 413), the court examined the limitations upon the power of the police to stop a motor vehicle on the public highway. The issue before the court was whether the police may stop an automobile solely because of unusual appearance, to examine the motorist's license and registration, or to inspect the vehicle for possible equipment violations. They held that a motor vehicle on a public highway may be stopped only where the officer has specific cause or reasonable suspicion of a violation of law or in accordance with nonarbitrary, nondiscriminatory uniform procedures, such as at roadblocks, checkpoints and weighing stations. They specifically prohibited stops that are "the product of mere whim, caprice or idle curiosity." (36 N Y 2d 420) As to permissible stops for specific cause or reasonable suspicion, they said it was "enough if the stop is based upon 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] instrusion' (Terry v. Ohio, 393 US 1, 21)." (36 N Y 2d 420).

The single issue presented is whether the action of the FBI agents in stopping the Panarella car was based upon specific facts which together with rational inferences from these facts reasonably warranted the intrusion. The ultimate determination of this issue will depend on the balancing of the legitimate interests of the defendants against the reasonableness and appropriateness of the police action (People v. Prochilo, et al., _____ N Y 2d _____, decided June 2, 1977).

This Court believes that the action of the FBI agents in stopping the Panarella car was permissible. This was not a routine traffic stop, nor was it based on the sort

of random and arbitrary stop that People v. Ingle (supra) was designed to prohibit. When the defendants' automobile was stopped, the FBI agents were in the process of executing a Federal arrest warrant against Alphonse Persico. At that time the FBI agents knew from their prior observations that the defendants were associates of Alphonse Persico and had reason to believe that at that time they were traveling with Mr. Persico even though two cars were being used. The agents also knew that firearms were located at the Persico Summer residence by the fact that Mr. Persico and Mr. Langello had been seen firing rifles in the area of the residence on the day prior to the arrest. They also knew that the defendants had been at the residence of Mr. Persico on the day that these weapons were being fired, and finally, as they moved in to arrest Persico, the agents observed the defendant Panarella making furtive movements which suggested to them that he was armed.

In the case of Terry v. Ohio, (392 US 1, 27) the Supreme Court of the United States said:

> "...there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."

Under the circumstances existing at the time, it was reasonable for the FBI agents to stop the Panarella vehicle as a means of insuring their own safety and well-being. Hence, the stop was permissible and the defendants' application to suppress the handguns seized from the defendants is denied.

The foregoing constitutes both the decision and the order of this Court.

Dated: June 17, 1977

S/RAYMOND J. MINO

County Judge of Ulster County